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Ormat Nevada Inc.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

15 THE FALLON PAIUTE-SHOSHONE TRIBE
16 and the CENTER FOR BIOLOGICAL
17 DIVERSITY,

18 Plaintiffs,

19 v.

20 U.S. DEPARTMENT OF THE INTERIOR,
21 BUREAU OF LAND MANAGEMENT, JAKE
22 VIALPANDO in his official capacity as Field
23 Manager of the Bureau of Land Management
24 Stillwater Field Office, and ORMAT
25 NEVADA INC.,

26 Defendants.

Case No. 3:21-cv-00512-RCJ-CSD

**PARTIES' JOINT STIPULATION ON
SCHEDULING ORDER**

1 Plaintiffs Fallon Paiute-Shoshone Tribe (“FPST”) and the Center for Biological Diversity
2 (“CBD”), Federal Defendants U.S. Department of the Interior, et al. (“Federal Defendants”), and
3 Defendant Ormat Nevada, Inc. (“Ormat”) (together, the “Parties”) have conferred and hereby
4 jointly submit the following stipulation and scheduling proposal for the Court’s consideration.

5 Plaintiffs filed this case on December 15, 2021, alleging that the Bureau of Land
6 Management’s (“BLM”) approval of the Dixie Meadows Geothermal Utilization Project (the
7 “Project”) violated the Administrative Procedure Act, National Environmental Policy Act,
8 Federal Land Policy and Management Act, and the Religious Freedom Restoration Act. ECF
9 No. 1. Plaintiffs filed a motion for preliminary injunction to stop Project construction (ECF No.
10 13), and this Court granted the motion, but only for a period of 90 days (ECF No. 41). The
11 Parties’ cross-appealed to the Ninth Circuit Court of Appeals, which affirmed this Court’s
12 decision. *FPST v. DOI*, Nos. 22-15092, 15093 (9th Cir. Aug. 1, 2022) (slip opinion).

13 On April 7, 2022, the U.S. Fish and Wildlife Service (“FWS”) exercised its emergency
14 listing authority under the Endangered Species Act (“ESA”) to list the Dixie Valley toad as
15 endangered for a period of 240 days, triggering ESA Section 7 consultation obligations between
16 BLM and the FWS for the Project. BLM and the FWS have begun informal consultation and are
17 working toward completing formal consultation. Federal Defendants lodged the Administrative
18 Record on April 29, 2022. On July 6, 2022, Plaintiffs filed their First Amended Complaint
19 adding ESA claims under Section 7 regarding the project’s alleged impacts to the Dixie Valley
20 toad and BLM’s consultation with FWS, and under Section 9 regarding BLM’s and Ormat’s
21 alleged “take” of Dixie Valley toad during Project construction and operation (together, the
22 “ESA Claims”). Ormat states that it is currently working collaboratively with BLM and FWS
23 through the Section 7 consultation process, including discussion and identification of potential
24 additional mitigation measures. In coordination with BLM and FWS and in an effort to support
25 the Section 7 consultation process, Ormat has determined that it will temporarily pause
26 construction of the Phase I power plant either until the FWS issues a Biological Opinion for the
27 Project thereby concluding the Section 7 consultation process, or until December 31, 2022,
28 whichever is sooner.

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In light of these developments, the Parties have agreed as follows:

1. Ormat will provide notice to the Parties at least 30 days prior to reinitiating construction of the power plant facilities at the Dixie Meadows site.
2. Plaintiffs will not file any motion for preliminary injunction or temporary restraining order regarding the Project unless they receive notice that Ormat intends to reinitiate construction.
3. BLM will lodge the Administrative Record for the ESA Claims with the Court and provide an electronic copy to the Parties by August 5, 2022.
4. Plaintiffs and Ormat will have 14 days from the lodging of the Administrative Record on August 5, 2022 to: (1) identify and communicate to Federal Defendants any issues regarding completeness of the Administrative Record and/or any requests for the admission of extra-record evidence; and (2) provide Federal Defendants with copies of any materials they seek to include in the Administrative Record or admit as extra-record evidence.
5. Federal Defendants will respond to any issues raised by Plaintiffs or Ormat regarding the contents of the Administrative Record and the admission of extra record evidence no later than September 2, 2022. The Parties thereafter will attempt in good faith to resolve any issues that are raised. Any subsequent motions regarding the Administrative Record will be due on September 9, 2022.
6. If Plaintiffs or Ormat file any motions regarding the Administrative Record, the Parties shall meet and confer for the purposes of agreeing upon a schedule for resolving those motions and briefing the Parties' cross-motions for summary judgment. If no motions regarding the Administrative Record are filed, Plaintiffs' opening summary judgment brief will be due on September 9, 2022, and will be limited to 60 pages.
7. If no Administrative Record motions are filed, the Federal Defendants' and Ormat's combined responses to Plaintiffs' motions for summary judgment and opening briefs in support of their cross-motions for summary judgment will be

1 due on October 7, 2022. Federal Defendants and Ormat shall each file a brief in
2 support of their cross-motions for summary judgment and responding to
3 Plaintiffs' motion for summary judgment. Federal Defendants' brief and Ormat's
4 brief shall each be limited to 45 pages.

5 8. If no Administrative Record motions are filed, Plaintiffs shall file a combined
6 reply in support of their summary judgment motion and in response to Federal
7 Defendants' and Ormat's cross-motions for summary judgment, which will be
8 due on October 28, 2022. Plaintiffs' brief shall be limited to 60 pages.

9 9. If no Administrative Record motions are filed, Federal Defendants' and Ormat's
10 replies in support of their cross-motions for summary judgment will each be due
11 on December 2, 2022, and each will be limited to 45 pages.

12 10. Plaintiffs do not waive any claims under the ESA or Religious Freedom
13 Restoration Act ("RFRA") which may not be resolved on summary judgment due
14 to unresolved issues of material fact. Plaintiffs take the position that because the
15 ESA and RFRA each provide their own cause of action, claims under these
16 statutes are not limited in scope by the APA and thus may not be limited to the
17 administrative record compiled by the agency. Federal Defendants' take the
18 position that ESA Claims are record-review claims governed by both the scope
19 and standard of the APA that do not present any unresolved issues of material
20 fact. Further, Federal Defendants and Ormat take the position that summary
21 judgment and the briefing schedule set forth above can resolve all claims in
22 Plaintiffs' First Amended Complaint.¹

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24
25 ¹ Federal Defendants also take the position that because Plaintiffs' APA claims challenge a final
26 agency action, those claims in this case should be decided primarily based on the Administrative
27 Record compiled by Federal Defendants. However, should the Court find that the introduction
28 of extra-record evidence is appropriate, the Parties do not waive their right to seek discovery
regarding the RFRA and ESA claims.

1 In light of the Parties' commitment to the expedited briefing schedule outlined herein,
2 and Ormat's intention to suspend construction until either completion of the Section 7
3 consultation process or the end of the year, the Parties respectfully request expedited review by
4 the Court, with a decision on the merits before the end of 2022.

5
6 RESPECTFULLY SUBMITTED this 1st day of August, 2022.

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IT IS SO ORDERED.

DATED: August 2, 2022.


UNITED STATES MAGISTRATE JUDGE